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No. 87-1813

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the erroneous admission into evidence of the hearsay statement of a declarant who did not testify at trial was harmless error.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 25 M.J. 423. The opinion of the Air Force Court of Military Review (Pet. App. 7a-13a) is reported at 21 M.J. 501.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 7, 1988. The petition for a writ of certiorari was filed on May 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial at McChord Air Force Base in Washington, petitioner, a member of the United States Air Force, was convicted of rape, in violation of Article 120 of the Uniform Code of Military Justice

(UCMJ), 10 U.S.C. 920. He was sentenced to confinement for five years and a dishonorable discharge. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 7a-13a). The Court of Military Appeals affirmed (*id.* at 1a-6a).

1. As summarized by the Air Force Court of Military Review (Pet. App. 7a-9a), the evidence at trial showed that petitioner and the victim, Airman First Class Sheree Hurst, met in the passenger terminal at McChord Air Force Base, where both were awaiting military transportation to other locations (Tr. 248, 250, 614). Both were anticipating lengthy waits, and there were no rooms available at the base, so petitioner suggested that they split the cost of a motel room, where they could rest and freshen up (Tr. 253). Hurst at first said nothing, but later agreed to an arrangement where petitioner would use the room until about 11 p.m. that night, when he said his flight was expected to leave,[1] and Hurst would have the room until the following morning (Tr. 253, 307). They then took a shuttle bus to the Fort Lewis Motel, which was located a short distance from McChord (Tr. 254). Hurst was still reluctant to share the room, but petitioner persuaded her to do so (Tr. 255, 309-310).

Petitioner obtained a room and Hurst gave him her half of the room rent (Tr. 255). Petitioner then left the room to purchase some liquor, and Hurst showered and changed clothes (Tr. 257, 313). After petitioner returned, she talked with petitioner for a while, they each had a drink, and Hurst then went to a bar for several hours, returning after she believed petitioner had left (Tr. 256-263,

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[1] In fact, petitioner knew at the time that his flight would not leave before the following morning because of repairs on the aircraft (Tr. 659-660).

314-348). When she entered the room, petitioner was still there, in the bed under the covers. He told her that his flight was not leaving until morning and that he would be staying the entire night (Tr. 264-265). Hurst did not consider that arrangement satisfactory, so she went outside and called for a taxi from a telephone at the motel (Tr. 265-266). When the taxi arrived a few minutes later, petitioner went out to meet the taxi and told the driver that the taxi was no longer needed (Tr. 267, 354, 523). Hurst became frightened and screamed to the driver not to leave (*ibid.*). As she attempted to leave the motel room, petitioner pushed her away from the door, closed it, and blocked it with his body (Tr. 267, 359-360). A struggle followed, in which petitioner grabbed Hurst, shook her, and pushed her onto the bed. She attempted to ward off his advances by screaming and by hitting and pushing him, but he eventually overpowered her, removed her clothes, and raped her (Tr. 267-270, 361-362, 363-385). Later, while petitioner was at the sink, Hurst escaped from the room and ran toward other motel guests, who had been drawn outside by the commotion. She was highly agitated, pleading for help and exclaiming that she had been raped (Tr. 270, 387-388, 454, 468-469, 482, 486, 525). She then went over to the taxicab, which had remained in the parking lot, and waited for the police, who arrived five or ten minutes later (Tr. 271, 415-416, 453, 468-469, 524).

Several witnesses testified that they heard screams and the sounds of a struggle coming out of the room occupied by petitioner and Hurst. Army Sergeant Edmundo Nigaglioni, a motel guest, testified that he heard screams coming from the room, and a woman saying "I won't do it—I won't do it" (Tr. 477-478). DiAnn Solomon, another guest, testified to hearing the screams for about 15 minutes and a "girl yelling for help, to please stop, and that it hurt" (Tr. 481). She also heard the sound of things

being thrown about the room (*ibid.*). Solomon walked outside her room, and shortly thereafter the victim came running up to her, grabbed her arms, and pleaded for help in a frightened, upset manner (Tr. 481-482). Army Private Jose Calderon, Ms. Solomon's fiance, also testified that he heard screams for approximately 15 minutes and that he heard a woman yelling "please stop," "it hurts," and "don't" (Tr. 485). Gregory Webb, the taxicab driver who was dismissed by petitioner, testified that he heard the victim screaming "don't leave me here" or "help me" and that he heard screams, punctuated by sounds of things breaking or someone hitting a wall (Tr. 523-524, 528-530). Webb was prohibited by company policy from rendering assistance inside the motel room (Tr. 524), but he told his dispatcher to call the police, and he remained in the motel parking lot (*ibid.*). He heard more screams from the room for 10 or 15 minutes, then a 5 to 10 minute lull, after which the victim ran out of the room screaming and shaking (Tr. 525, 529-531). Another cab driver who arrived on the scene gave similar testimony (Tr. 468-469, 475).

In addition to the testimony of those witnesses, the prosecution offered a written statement executed by another motel guest, Mrs. Kwang Sun Bordoy, on July 10, 1984, two days after the rape (Tr. 50; PX 2).[2] Over defense

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[2] Bordoy's statement said in pertinent part (PX 2):

> I arrived at McChord AFB, WA, at approximately 1 p.m., 8 Jul 84, with my husband and daughter. We are on leave awaiting air transportation to Korea.
>
> Sometime after I put my baby to bed at approximately 10:30 the night of 8 Jul 84, I heard a scream from the apartment area. I then saw a black man push a white woman into apartment 17. I then went to my husband and told him what I saw. I told him I thought the girl was being raped. She kept screaming for about 10

objection, the trial judge admitted that statement under Mil. R. Evid. 804(b)(5), the so-called residual exception to the hearsay rule for an unavailable witness (Tr. 89).

2. At trial petitioner admitted engaging in sexual intercourse with Hurst but contended that it was consensual (Tr. 645-648, 651, 658). He testified that when she returned to the room late that night, she was upset over something that apparently had occurred earlier while she was out (Tr. 638). He admitted that she was screaming; that he prevented her from leaving the room after he dismissed the taxi; and that he grabbed her, shook her, and forced her to the bed (Tr. 640-652). He attributed Hurst's screaming to her emotional distress over whatever had previously upset her, and he justified his actions in grabbing, shaking, and forcing her to the bed on the ground that they were his efforts to calm her down and find out what was wrong (Tr. 640-644). He testified that Hurst calmed down after they were on the bed, that they engaged in consensual intercourse, and that afterwards she screamed again and ran out of the room (Tr. 645-650).

3. The Air Force Court of Military Review ruled that the admission of Bordoy's statement was error, because the prosecution had not shown that Bordoy was unavailable within the meaning of Mil. R. Evid. 804(b)(5). Pet. App. 12a. Nonetheless, that court held that the error was harmless, given the "overwhelming" proof of petitioner's guilt. *Id.* at 13a. Petitioner sought review of that finding in the Court of Military Appeals, but the court

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minutes or so. She finally came running out of the apartment and went over to a taxi driver. Shortly after that the police arrived.

This all happened at the Ft. Lewis Motel, Tacoma, WA. We were staying in room 6. Room 17 is almost directly across from our room.

declined to grant review of that issue. It affirmed petitioner's conviction after considering another issue. *Id.* at 1a-6a.

ARGUMENT

Petitioner contends that the Air Force Court of Military Review incorrectly found that the admission of Bordoy's statement was harmless.[3] That fact-bound claim does not merit review by this Court.

1. Petitioner argues (Pet. 4-5) that the court of military review applied the wrong standard in finding the error harmless. He claims that the court of review applied a "de minimis standard," rather than the supposedly more rigorous harmless error standard adopted in *Chapman* v. *California*, 386 U.S. 18 (1967). That claim lacks merit.

The erroneous admission of evidence in violation of the Confrontation Clause is harmless if, in light of all the evidence in the case, there is no reasonable possibility that the erroneously admitted evidence contributed to the verdict. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986). The court of military review implicitly but correctly applied that standard. The court found (Pet. App. 12a) that the marginal effect of Bordoy's statement on the proof of petitioner's guilt was de minimis, which is simply another way of stating the *Chapman* standard. Moreover, a court of military review must independently review the record

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[3] Petitioner also asserts (Pet. i, 7) that a harmless error analysis is inappropriate because of the seriousness of the error. He cites no case to support that proposition, and we know of none. This Court has consistently applied a harmless error analysis to Confrontation Clause violations and has rejected the call for a rule of per se reversal. *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986); *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973); *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969).

and be convinced of the correctness of a finding of guilt beyond a reasonable doubt before that finding may be upheld. Art. 66(c), UCMJ, 10 U.S.C. 866(c); *United States* v. *Turner*, 25 M.J. 324, 324-325 (C.M.A. 1987). The court of military review carried out that responsibility in this case after ruling that Bordoy's statement had been erroneously admitted. Pet. App. 13a. In so doing, that court in effect concluded that the error in admitting her statement was harmless beyond a reasonable doubt. The failure on the part of the court of military review to cite this Court's decisions in *Chapman* or *Van Arsdall* is therefore of no significance, because the court's ruling was clearly consistent with the harmless error standard applied by this Court.

2. Petitioner also argues (Pet. 5-7) that the admission of Bordoy's statement was not harmless, because it constituted evidence of an essential element of the crime of rape (*i.e.*, the use of force) and because it tended to corroborate the victim's testimony. That claim is meritless. Bordoy's statement could not have materially affected the verdict, because it was cumulative of the other evidence that was properly before the trier of fact, including petitioner's own admissions at trial, all of which overwhelmingly established his guilt.[4]

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[4] Compare *Brown* v. *United States*, 411 U.S. at 231 (the admission of non-testifying co-defendants' confessions in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968), was harmless in light of their cumulative nature and the overwhelming evidence of guilt properly before the jury); *Schneble* v. *Florida*, 405 U.S. at 430-432 (*Bruton* violation held harmless error where confession at most merely corroborated the accused's confession and there was overwhelming independent evidence of guilt); *Harrington* v. *California*, 395 U.S. at 252-254 (*Bruton* violation held harmless error where co-defendants' confessions were cumulative and the independent evidence of guilt was overwhelming).

The only disputed issue at trial was whether Hurst consented to sexual intercourse with petitioner, and Bordoy's statement could not have had a material effect on the court-martial panel's resolution of that question. Insofar as the statement relates that Hurst was screaming and later ran for help, the statement was merely cumulative of the independent, uncontroverted testimony offered by five prosecution witnesses. In addition, even though petitioner did not testify that he used force to push Hurst back into the room, he did admit that he used force to subdue Hurst once she was inside the room in order, he claimed, to find out what was bothering her. Accordingly, the inference that petitioner used force against Hurst was inescapable, from petitioner's own testimony if from nowhere else.[5]

Moreover, the independent evidence properly before the court-martial panel overwhelmingly established petitioner's guilt. In addition to the victim's strong and unwavering testimony, there was uncontroverted evidence that petitioner struggled with Hurst; that she tried to get away; that petitioner prevented her from doing so; that petitioner forced Hurst to the bed; that Hurst was screaming "I won't do it," "please stop," "it hurts," and "don't,"

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[5] Petitioner asserts (Pet. 7-8) that Bordoy's statement that "I thought the girl was being raped" compounded the prejudice he suffered, since that statement constituted an improper "legal conclusion." The full text of Bordoy's statement on that point was "I told him [her husband] I thought the girl was being raped" (PX 2). Rather than stating a legal conclusion, that statement merely related what she told her husband at the time the events were occurring. Therefore, the statement, had she testified, could arguably have been admitted either to explain why she took notice of the events and continued watching for ten or more minutes, or as a "present sense impression." In any event, it is unlikely that the court-martial panel found petitioner guilty of rape merely because Bordoy had that impression.

throughout the ordeal; and that Hurst ran from the room crying and screaming for help. In light of that evidence, petitioner's claim that Hurst consented to intercourse was simply not credible, and it was not made any less credible by the erroneous admission of Bordoy's statement. The error in admitting the statement was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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